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No. 09-496

Supreme Court, U.S.
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In The Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Brown respectfully petitions for rehearing of this Court's November 30, 2009, order denying certiorari. Petitions for rehearing are appropriate where there are "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." Sup. Ct. R. 44.2. Both grounds apply here. For the reasons stated below, Brown requests that this Court:

(i) require that the Solicitor General file a response to Brown's petition; and,

(ii) either grant Brown's petition or hold it for consideration after this Court issues decisions in *Black*, *Weyhrauch* and *Skilling*.

INTRODUCTION

Brown's petition raises a claim of double jeopardy for consecutive wire fraud prosecutions depending solely on purported "intangible rights." Petitioner has already been acquitted of wire fraud under 18 U.S.C. §§ 1343 and 1346, and the government now seeks to retry him on the same facts and scheme, using 18 U.S.C. § 1343 alone – with the only difference in the two indictments being the deletions of the phrase "honest services" and of the citations to § 1346. The Fifth Circuit authorized the government to proceed with this second prosecution, but the government's position and the Fifth Circuit's interpretation of the

applicable law are squarely contradicted by the government's recent admissions to this Court at oral argument in cases involving these same provisions. *Black v. United States,* No. 08-876; *Weyhrauch v. United States,* No. 08-1196. *See also Skilling v. United States*, No. 08-1394.

The Government hid this inconsistency by the device of filing a waiver of response to Brown's petition for certiorari. As explained more fully below, this was not done by the Office of the Solicitor General, but by the Criminal Division pursuant to a delegated authority that allows waivers to be filed in criminal cases by the prosecutors, rather than by the Office of the Solicitor General. As a result, in this case, no one in that Office reviewed the petition or examined the appropriateness of a waiver. Whatever the propriety of such delegation in general, it was inappropriate here because of the close relationship of the issues in *Brown* to those in *Black*, *Weyhrauch*, and especially *Skilling* (where defendant's convictions rest in part on the exact same transaction at issue here). Accordingly, rehearing should be granted to direct the United States to file a response and explain its contradictory positions in *Black* and *Weyhrauch* and to avoid inconsistency with *Skilling*.

REASONS FOR GRANTING REHEARING

In his original petition, Brown, a Merrill Lynch employee, argued that the government's attempt to

try him again for failing to disclose information to Enron and its shareholders – based on their purported "intangible right" to "certain information" – after he had been acquitted of honest services fraud, violated the constitutional principles of double jeopardy and set a dangerous precedent. It raises the specter of a government end-run around any court-imposed limitation on – or outright rejection of – "honest services" prosecutions. The government conceded it cannot retry Brown under § 1346. The Fifth Circuit found Brown's conduct was not criminal under § 1346. Yet the identical remaining wire fraud charges (conspiracy and substantive) in this case depend solely on an instruction to the jury that Brown violated someone's amorphous intangible rights – now under § 1343 alone. The government's willingness to argue one thing to this Court but pursue a very different strategy before the Fifth Circuit, against Brown and others, require this Court's intervention. At a minimum, this Court should require the Solicitor General to respond to Brown's petition and to explain the government's inconsistent positions on intangible rights.

I. REHEARING SHOULD BE GRANTED TO REQUIRE THE SOLICITOR GENERAL TO REVIEW AND RESPOND TO BROWN'S PETITION AND EXPLAIN THE GOVERNMENT'S CONFLICTING POSITIONS.

Brown's 38-page petition was filed on Friday, October 23, 2009, and by Tuesday, November 2, 2009,

the government had filed a waiver in the name of the Solicitor General. Given the complexity of the double jeopardy issue and its relationship to *Black*, *Weyhrauch,* and *Skilling*, not to mention the heavy workload of the Department of Justice generally, and of the Office of Solicitor General in particular, it would have been impossible for the Criminal Division to have reviewed the petition and written a recommendation to the Solicitor General's Office, and for that Office to have reviewed the petition and recommendation and determined to file a waiver, all within 11 days, including two weekends, while they were also preparing for two oral arguments before this Court and presumably handling other matters.

Because a waiver was filed, there was no opportunity for petitioner to respond further, including to argue that the case should be held for *Black*, *Weyhrauch,* and *Skilling*, although all three cases were featured in the petition. This Court denied the petition on November 30, 2009. A week later, this Court heard oral arguments in *Black v. United States,* No. 08-876, and *Weyhrauch v. United States,* No. 08-1196, and repeatedly referred to the third case, *Skilling v. United States*, No. 08-1394, which recently has been advanced to oral argument on March 1, 2010.[1] Counsel of record in this case, Sidney Powell,

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[1] Skilling's conviction rests, in part, on the same transaction for which Brown faces a second trial for purported failure to disclose information to which "certain persons" had an "intangible right," despite the fact that Brown had no duty to disclose,

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attended the oral arguments in *Black* and *Weyhrauch*, where the Deputy Solicitor General made concessions regarding §§ 1343 and 1346 that supported Brown's double jeopardy claim in this case. *See* note 3, *infra*. Later that day, Powell discussed these developments with co-counsel on the rehearing petition, Alan B. Morrison, who informed Powell that he had another criminal case earlier this term, in which a waiver was filed in the name of the Solicitor General. At that time, a senior attorney in that Office advised Mr. Morrison that the Solicitor General formally delegated authority to the Criminal Division to file waivers; and, that when the Division exercised that authority, no one in the Solicitor General's Office saw the petition – let alone reviewed the propriety of filing a waiver in light of the position of the United States in other cases (*Black*, *Weyhrauch*, and *Skilling* in this instance).[2] Powell subsequently confirmed by telephone that the Deputy Solicitor General was not familiar with Brown's petition, despite the fact that

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and neither paid, sought or received any bribes, kickbacks or personal gain. Each of the trilogy of intangible rights cases pending before this Court implicates the first, inherent issue in *Brown* – the scope of the government's authority, if any, to prosecute "intangible rights" under 18 U.S.C. §§ 1341 or 1343, and 1346.

[2] It is most likely, as has become too common a practice, that someone in the Criminal Division of the Department, which has a long-standing vested interest in the many problematic Enron-related prosecutions, filed the waiver in an attempt to influence this Court to deny certiorari.

Brown's question presented is intertwined with the pending trilogy of honest services cases.

Undoubtedly, there are cases in which the United States may appropriately file a waiver where the decision is based on legitimate factors, such as the insignificance of the case or the absence of any relationship between that case and others in which similar issues are pending before this or other courts. But, this is not such a case. As the petition explains, the Fifth Circuit reversed petitioner's original convictions because Brown's conduct did not constitute an intangible rights or honest services fraud (dependent on §§ 1343 and 1346). Later, a different panel wrote an opinion explaining why the identical indictment, merely redacted of its "honest services" language, could support a re-trial under § 1343 alone, based on the identical facts. Filing a waiver enabled the United States to avoid coming to grips with the contradictions between its assertions in this case and the statements it made to this Court in *Black* and *Weyhrauch*, including references to *Skilling*.

The government should not be allowed to hide its contradictory positions by use of a form waiver. Given the grants of review in the three honest services cases and their close connection to this case, petitioner could not reasonably have anticipated that the United States would file a waiver in this case. Nor would it have been reasonable to include an anticipatory response in the petition: that is the purpose of a reply brief. Indeed, even a suggestion to hold this case for *Black*, *Weyhrauch*, and *Skilling* would have

been premature and unwarranted until the United States filed a response. For these reasons, filing a waiver in this case was improper, and this Court should direct the United States to file a response to Brown's petition.

II. THE RECENT CONCESSIONS BY THE GOVERNMENT UNDERSCORE WHY BROWN IS ENTITLED TO A REVERSAL AND PROTECTION FROM THE IRREPARABLE HARM OF A SECOND TRIAL FOR WIRE FRAUD.

At oral arguments before this Court, the Solicitor General conceded two points that entitle Brown to a reversal of the Fifth Circuit's decision in *Brown II*:

(i) "Intangible rights" may only be vindicated through reference to the honest services provision of the wire fraud statute.[3]

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[3] *Black* Oral Arg. Tr. 29 ("this Court held in *McNally* that the mail fraud statute [and by extension the wire fraud statute] did not protect intangible rights"); 46 ("this Court held [in *McNally*] that the mail fraud statute [and by extension the wire fraud statute] did not protect the deprivation of intangible rights"); 48 ("Congress intended to basically say to this Court [after *McNally*], you have determined that intangible rights are not protected under the mail fraud statute. . . . Congress desired to correct the statute [via § 1346] by protecting frauds that involve intangible rights."); *Weyhrauch* Oral Arg. Tr. 28 ("purpose of the statute [§ 1346] was to restore at least some part of the pre-*McNally* doctrine of intangible rights."); 41 ("the phrase

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(ii) "[N]on-disclosure of material information," standing alone, is "not enough" to constitute a valid charge of wire fraud under the honest services statute. *Weyhrauch* Oral Arg. Tr. 31-32; *see also id.* at 29 ("We are not here to argue that there is a free-standing federal duty of disclosure that applies in all cases . . . ").[4]

These and other admissions made at oral argument squarely contradict the government's position that it is entitled to prosecute Brown a second time, using § 1343 alone, for "property" defined as "the intangible right that certain persons have to some kinds of information." The Solicitor General conceded that the wire fraud statute alone, without reference to honest services as defined in § 1346, cannot be used to vindicate "intangible rights" or prosecute a mere "non-disclosure of material information." Yet, this is exactly what the government will do in a second prosecution of Brown unless this Court intervenes and reverses the dangerous precedent of the Fifth Circuit that licenses the government to prosecute defendants again on the same indictments

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'intangible rights' is at the center of the *McNally* majority opinion."); 46 (*McNally* held that "the mail fraud [and by extension wire fraud] statute did not protect intangible rights.").

[4] Brown, a Merrill employee, had no duty to Enron or its shareholders, as the Fifth Circuit held with respect to this transaction in *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393 (5th Cir. 2007).

and reach "intangible rights" through § 1341 or § 1343 alone.

As noted in the original petition for certiorari, this case provides the Court with a vehicle for clarifying what, if any, wire fraud offense, premised on the exact same facts, scheme and allegations, may be re-tried after an honest services or intangible rights conviction is held invalid. If the Fifth Circuit's decision in *Brown* is left standing, the government has precedent adding further confusion to this already troubled area of the law and opening the door to its circumvention of any decision of this Court declaring § 1346 unconstitutional or limiting its scope.[5]

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[5] Moreover, the Fifth Circuit has authorized the government to prosecute Brown again for what four other Circuits would necessarily hold is a clear double jeopardy violation. In *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000), this Court found that the mail fraud statute creates only one offense. Further, the Fourth, Seventh, Eighth and Tenth Circuits have held that Section 1346 does not create an offense separate from § 1343, and for which Brown could be prosecuted a second time. *See United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001); *United States v. Orsburn*, 525 F.3d 543, 546 (7th Cir. 2008); *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000); *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003). The courts below did not even require the government to demonstrate that the two indictments charge Brown with legally separate crimes. *See also United States v. Rigas*, 584 F.3d 594, 609, 614 (3d Cir. 2009) (accepting double jeopardy argument and employing the appropriate burden-shifting standard for double jeopardy claims). Honest services and wire fraud are not

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The issues presented in this case are significant. The district court explicitly held they warranted review, and Brown's petition raises questions inextricably intertwined with those that will necessarily be decided in or result from the Court's pending trilogy of honest services cases. The compelling concessions by the Solicitor General directly contradict the government's position in *Brown* – rendering re-prosecution a travesty and introducing the possibility of a deliberate strategy by the government to evade this Court's rejection of the unconstitutionally-vague "intangible right of honest services" and relegation of § 1346 to the *McNally* scrap-pile.

The conflict between Brown's *second* prosecution for intangible rights under § 1343 and the government's statements to this Court on December 8, indicate, at best, that the government has not thought through the implications of its positions in *Brown* or the pending trilogy. At worst, the government is willing to wield the immense power of the sovereign to re-prosecute Enron-related defendants – even at the expense of the Fifth Amendment right against double jeopardy, its duties to this Court and its obligation to seek justice for all. *Berger v. United States*, 295 U.S. 78, 88 (1935).

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separate crimes under *United States v. Dixon*, 509 U.S. 688, 696-97 (1993).

CONCLUSION

For these reasons, and for the reasons stated in the petition for writ of certiorari, this Court should grant rehearing of the order of denial, vacate that order, require a response from the Solicitor General, and either grant the petition for writ of certiorari or hold it for further consideration in light of the pending trilogy of intangible rights cases.

Dated: December 23, 2009

Respectfully submitted,

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CERTIFICATION OF COUNSEL

The foregoing petition for rehearing is restricted to the grounds specified in Supreme Court Rule 44.2, and is presented in good faith and not for the purposes of delay.

Respectfully submitted,

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Sidney Powell